85-688

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

FRANK PIETRONIRO, Vice-President,
MARY PIETRONIRO, Pres.,
PIET CORPORATION

Petitioners,

v.

BOROUGH OF OCEANPORT, CLEMENT SOMMERS, ELWOOD BAXTER, LOUIS SYLAVIN, GEORGE BARRETT, NICHOLAS LEONE

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I. Did the Third Circuit Court of Appeals violate appellees' due process and equal protection rights:

(a) Ruling, as a matter of law, that a select class of commercial operator could be accorded preferential assistance over other commercial operators, similarly situated and displaced, in an urban renewal area? and:

(b) Where sufficient evidence at trial demonstrated a causal nexus establishing that petitioners were not given the same, maximum relocation advisory assistance to the KINCAID and RATTI tracts given to other displacees.

II. Did the Third Circuit Court of Appeals create a conflict within the Circuits under the Uniform Relocation Assistance Act of 1972 and the Housing Act of 1949 in making these conclusions of law and findings in its opinion?

III. Are there important questions of federal law under these Congressional Acts which should be decided and settled by the United States Supreme Court, including but not limited to the fact the Third Circuit Court of Appeals has decided a federal question under federal law in a way that conflicts with applicable Supreme Court decisions, failing to follow procedural review standards?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... iii

OPINIONS BELOW..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS..... vi

STATEMENT OF JURISDICTION..... 1

STATEMENT OF THE CASE..... 1

A. District Court Proceedings... 6

B. Appellate Proceedings..... 16

REASONS FOR GRANTING THE WRIT..... 19

CONCLUSION..... 30

APPENDIX..... A1

TABLE OF AUTHORITIES

Cases	Page
Barnes v. Tarrytown Urban Renewal Agency, 388 F.Supp. 275 (D.C.N.Y. 1971)	29
Battison v. City of Niles, 445 F. Supp. 1080 (D.C.N.Ohio 1977	25
Bell v. Burson, 402 U.S. 535 (1971)	29
Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536 (1974)	6
Board of Regents v. Roth, 408 U.S. 564 (1972)	29
Cutting v. Muzzey, 724 F.2d. 259 (ist Cir. 1984)	5
Daly v. Elton, 195 U.S. 242, 25 S. Ct. 22	27
Dobbins v. Los Angeles, 195 U.S. 223, 25 S. Ct. 18	27
Eisen v. Eastmen, 421 F.2d. 567 (2d. Cir. 1969)	29
Elmwood Properties v. Conzelman, 418 F.2d. 1025 (7th Cir. 1969)	27
English v. Town of Huntington, 335 F. Supp. 1369 (D.C.N.Y. 1970)	29
Garren v. City of Winston-Salem, 463 F.2d. 54 (4th Cir. 1972)	26
Glicker v. Michigan Liquor Control Com., 160 F.2d. 96 (6th Cir. 1969)	29
Gomillion v. Lightfoot, 364 U.S. 339, 81 S. Ct. 125 (1960)	26

Home Furniture v. HUD,
324 F. Supp. 1401 (D.C.N.Car. 1971)....20

Hornsby v. Allen,
326 F.2d. 605 (5th Cir. 1969).....29

Ka-Haar v. Huck,
345 F. Supp. 54 (D.C.Wisc. 1972).....29

M. Crockin Co. v. Portsmouth
Redevelopment Authority,
437 F.2d. 789 (4th Cir. 1971).....20-23

Paul v. Davis,
424 U.S. 693 (1976).....29

Reinman v. Little Rock,
237 U.S. 171, 35 S. Ct. 511.....27

Scott v. Greenville County,
714 F.2d. 1409 (4th Cir. 1983).....5

Shamie v. Pontiac,
620 F.2d. 118 (6th Cir. 1980).....29

Sixth Camden v. Evesham,
420 F. Supp. 709 (D.N.J. 1976).....4

Smith v. Missouri State Highway Com.,
488 S.W.2d. 230 (Mo. 1972).....22

Tullock v. Missouri State Highway Com.,
507 F.2d. 712 (6th Cir. 1974).....22

Constitutional Provisions:

Fourteenth Amendment to the U.S.
Constitution.....vii

Statutory Provisions:

42 USC 4601.....vii

42 USC 4625.....vii
42 USC 1455.....vi
42 USC 1983.....vi
24 CFR 42.105.....vii
24 CFR 42.115.....vii
HUD Handbook regulations 1320.1, 1371.1.viii
28 USC 1331.....1
28 USC 1343.....1
28 USC 1254.....1
28 USC 1257(3).....1
24 CFR 42.180.....11
HUD Handbook regulation 7211.1.....10-11

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment states,in part;

> "..nor shall any State deprive any person of life, liberty, or property without due process of law..or deny equal protection under the law".

42 U.S.C. 1983 states:

> "Every person who, under color of any statute..regulation..of any State or Territory, subjects or causes to be subjected, any citizen of the U.S. or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...."

The Housing Act of 1949, 42 USC 1455 (c)(1) states:

> "There shall be established, at the earliest practicable time, for each urban renewal project involving displacement of..business concerns..a relocation advisory assistance program which shall include..services as may be necessary and appropriate to (B) provide information and asistance to aid in relocation and minimize hardships of displacement..;and (C) assure necessary coordination of relocation activities with other project activities.." (EMPHASIS ADDED)

The Uniform Relocation Assistance Act of 1972, 42 USC 4601, 4625 states:

> "Displaced Person means any person who moves from real property

..as the result of the written order of the acquiring agency to vacate.. for a program receiving federal financial assistance..on which such person conducts a busines.. Person means individual or corporation." 42 USC 4601 (5) (6).

"Federal and State and Local agencies..shall cooperate to the maximum extent feasible with the.. agency causing the displacement to assure that such displaced persons receive maximum assistance (c) Each relocation assistance advisory program..shall include measures and services necessary to..

(1) Determine the need, if any, of displaced persons for relocation assistance;
(2) Provide current and continuing information on the availability, prices and rentals of comparable commercial properties and locations for displaced businesss; (EMPHASIS ADDED)
(4) Assist a person displaced from his business in obtaining and becoming established in a suitable replacement location.(EMPHASIS ADDED)
(6) Provide other advisory assistance..to minimize hardships..in persons adjusting to relocation. 42 USC 4625 (c); 24 CFR 42.115.

24 CFR 42.105 states:
"State agencies shall develop and implement a relocation assistance advisory program..to provide maximum assistance..and assure that (business displacees) are assisted in reestablishing with a minimum

of delay and loss of earnings.."

Federal HUD Handbook regulations 1320.1 and 1371.1 provide:

"A relocation plan must be submitted to HUD to qualify for federal funding which must include a full description of the relocation assistance to be provided..including the local agency's proposals for providing a relocation assistance advisory program described within 42 USC 4625 and 24 CFR 42.115

"..(b) Business concerns (shall be)..provided maximum assistance to aid in their satisfactory reestablishment with a minimum of delay and loss of earnings..(c). program activities be carried out in a manner that minimizes hardships..(g) Displaced persons be afforded the opportunity of participating in the formulation of relocation plans..and be provided full information.."

"..(b)..Services to be provided.. (2) The local agency shall provide current and continuing information on the availability, costs, and square footage of comparable commercial, industrial or farm locations and make referrals to real estate brokers..providing maximum assistance..but avoiding involvment with the decisions of the business owner.."(EMPHASIS ADDED)

"..Real property acquisition activities shall be coordinated with relocation activities..The local agency shall..periodically review the quality and quantity of relocation services provided....."

Additionally, the local agency is not to terminate assistance until the business has received all of its relocation payments and advisory assistance and has either successfully relocated or voluntarily has ceased operations.

STATEMENT OF JURISDICTION AND OPINIONS BELOW

The jurisdiction of the District Court was invoked under 28 USC 1331, 1343, 42 USC 1983. The juridiction of this Court is invoked pursuant to 28 USC 1257(3) and 28 USC 1254. The judgment of the Third Circuit Court of Appeals sought to be reviewed was rendered June 18, 1985, with Rehearing In Banc summarily denied without opinion on July 18, 1985. (App. pp. A5-A20)

STATEMENT OF THE CASE

After a trial in New Jersey Federal District Court, petitioners Frank Pietroniro and Piet Corporation obtained a judgment of $197,950.00 on October 17, 1983. The jury found that the petitioners, who were urban renewal business displacees in Oceanport, N.J., had not received maximum, proper relocation advisory assistance by defendants

for the relocation of their displaced liquor license and that defendants had acted in bad faith towards petitioners in the implementation of the renewal.

On direct appeal, the Third Circuit Court of Appeals reversed the judgment on June 18, 1985 and denied rehearing on July 18, 1985. The Court ruled that defendants:

(a) were not obligated, after 1975, to assist petitioners in obtaining replacement land the municipality had acquired during the renewal (e.g."Ratti Area"); and [1/]

(b) could permissably render preferential relocation advisory assistance to a select class of professional commercial operator over petitioners in those select individuals obtaining replacement land in the above area. [2/]

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[1]/The renewal "Ratti" area was subject to Congress' national goals developmental ratio of 51 per cent residential- 49 per cent commercial, ignored by the Appeals Court. The defendants had exclusive control over the area in making parcels available for sale and redevelopment.They extended an option to one class but re-

Due to these specific conclusions of law, the Court of Appeals found there was insufficient evidence to support the verdict. Another erroneous finding also led to this belief. The opinion stated that petitioners stipulated that five alternative business locations had been referred through defendants' advisory assistance and that petitioners had conceded that the only acceptable alternative location was a residential parcel. Direct evidence at trial, however, demonstrated that only four and not five of these locations were referrals. The fifth location, the "Kincaid" tract, was never a stipulation nor referral by the defendants. Such demonstrates a grave error and mistake made in fused to extend any similar purchase options to petitioners on a like parcel.

[2]/ It is also important to note that the defendants used the relocation advisory assistance program to make commercial recommendations to an independent Board of Adjustment to aid in the select class of professional commercial operator obtaining that Board's concurring approval.

the findings of the Appeals Court.

Most signifigantly, uncontroverted lay and expert testimony at trial demonstrated the Kincaid tract to be an acceptable, commercial, alternative location for petitioners, had it been properly referred under the relocation statutes. This was duly brought to the attention of the Appeals Court in the petition for Rehearing In Banc, which was summarily denied without opinion. (App. Pg. A20).

Evidence regarding the Kincaid tract permeated over forty pages in the record, wherein defendants admitted it was zoned commercial, they knew it was available, and

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3/ It is important to note that defendants' refusals to sell petitioners a renewal parcel precluded petitioners from obtaining a variance in the first instance, having no land to base the relocation or variance upon. Such preclusion, caused by defendants' inaction in failing to render relocation assistance to facilitate same (e.g. failing to make renewal land available so proper application could be initiated by petitioners) such arbitrary and capricious conduct violates their guarantees of due process under the law. Sixth Camden v. Evesham,

expert Heaslip testified its location was valuable to petitioners:

> " Remarkable aspect of it is I would presume that the name that Piet Corporation would wish to maximize the name under which it operated for 15 odd years; in other words, the Colonial Jockey Room..Relocating to either one of those locations(referring in part to the Kincaid tract) would put it (Piet)closer to the track and it could have maximized what it already had going for it; in other words, 15 years of reputation with a name associated with racing.."[222]/

Pietroniro and Bataas, another displaced licensee, testified defendants failed to refer the Kincaid parcel in the advisory assistance program.[222]/ Petitioners seek review herein upon due process and equal protection rights for business dis-

[222]/ Testimony of Sommers, Boynton, Bataas, Heaslip App. Record A2021, A2022, A1645, A1648, A2628; Barrett, Leone and Sylvain at A2171, A2172, A2214, A2438; Pietroniro at A1119,A1122, A864. Leone admitted he did not provide Piet with proper referral information with Kincaid missing from Sylvain's own referral lists through his testimony and letters. Sylvain at A2262-A2264,A2348; Leone at A2202, A2203,A2204. Bataas at A713, A714,A686, A687.

[3]/ 420 F. Supp. 709, (D.N.J. 1976); Cutting v. Muzzey, 724 F.2d. 259 (1st Cir. 1984); Scott v. Greenville, 714 F.2d. 1409(4th Cir. 1983).

placees within federally funded urban renewal projects throughout the United States under the relevant federal acts and statutes heretofore enumerated.[4]/ The factual circumstances material to a consideration of the questions presented are set forth as follows.

A. DISTRICT COURT TRIAL PROCEEDINGS

Petitioners operated a tavern, food and apartment business, 1961-1975, in Oceanport, N.J. having a "Broad C" liquor license, which forms the res of this case.[5]/ They were displaced pursuant to a federally funded renewal program. The license remains unrelocated to date due to denials of maximum assistance in obtaining a suitable replacement site. The

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[4]/ The treatment accorded the similarly displaced professional commercial operators underscores the procedural disparity in this program. The petitioners suffered denials of relocation assistance and the denials by the defendants impermissably infringed upon their constitutional rights and right of association. Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536 (1974).

Petitioners have expended $5,500.00 in license renewal fees from 1975-1985 while being deprived of the use and benefit of it due to defendants' denials of proper relocation advisory assistance.

To initiate federal funding, the municipality was required to submit broad relocation plans to the United States Department of Housing and Urban Development. ("HUD") Under 42 USC 1455, 4625, 24 CFR 42.105, 42.115, the locality is obligated to: (a) assist a displaced business in obtaining a suitable replacement location rendering maximum assistance;[6] and (b) provide current and continuing information on the availability, prices, costs, and square footage of comparable commercial properties and locations.

[5] The liquor license is extremely valuable, allowing an operator to sell "on-premises" consumption and "off-premises" package liquor as a separate partitioned business.

[6] To provide maximum assistance, defendants had the duty to adhere to Congress' 49 per cent commercial redevelopment national goals program and, in effect, make land available in the renewal to business dis-

In 1972, public hearings were held on the renewal for citizen imput. Oceanport's Planner and Defendant Baxter represented businesses would be extended relocation opportunities in the renewal area, which encompassed the earlier existing business district from which they were displaced, (the "Ratti" area) which was initially zoned totally residential. Under Congress' national goals development program, the area was subject to a 51 per cent residential-- 49 per cent commercial redevelopmental ratio as the need arose for business relocation. This was so acknowledged in the trial record by defendants:

placees as the need arose for them to obtain a suitable replacement location.Home Furniture v. HUD, 324 F. Supp. at 1404 (D. C. N. Car. 1971); Battison v. City of Niles, 445 F. Supp. 1080 at 1085. (D. C. N. Ohio 1977) This is to be accomplished by defendants releasing some renewal land either under purchase option designated as commercial or designated as initially residential subject to petitioners then applying for a variance, as the professional commercial operators did using the advisory assistance program, once the purchase option is duly and rightfully extended to them. (EMPHASIS ADDED)

BAXTER: "..It is taken land. It will be rendered residential, 51 per cent of it. We are operating within the parameters of this program and we would certainly want to take care of people as part of our relocation project.." (Record A1532)

BAXTER: "..Because under national goals.. we are forced to render 51 per cent of all disposable land to residential use.." (Record A1533)

PLANNER LONERGAN: "..Right now, the master plan calls for this entire area as residential..This is the recommendation..with provisions ..in the plan..existing businessmen in an area around..Oceanport Ave..would be allowed to remain so long as they serve the existing neighborhood.... such as the bars and gas stations.. we see they are needed someplace... There is nothing to stop you from saying that next year, as things develop and more information is available that you cannot designate something more in here for commercial..".(Record A1539)

"..Again bearing in mind..you have to keep in mind national goals and cannot exceed 51 per cent of the area for non-residential (commercial) uses..".(Record A1540)

SOMMERS: "..The possibility exists but it would depend upon the finalization of a firm plan..They also pointed out there was a national goal that 51 per cent..a minimum.. had to be residential in use... Q. Then 49 per cent could have been commercial?..A. Yes..according to the general outlines of national goals.." (Record A2070)

HUD official Pat Burke: "..The town does have authority to pass an ordinance or resolution stating the right to acquire land..or the new development will be first given to relocatees from the project..This kind of thing is done for residential relocatees.. and also can be done for businesses."7/ "..Most of the relocation foreseen in this project is business."(Record A2077-2078)

From 1974-1975, Petitioners endured real property condemnation, continuing at the premises in tenancy to the Boro, which was pervaded by numerous violations by defendants of HUD regulations, which governed the tenancy, including:

(a) Failing to charge proper rental rates set by appraisers, excluding utility charges from same, violating HUD regulation 7211.1;

(b) Failing to consider petitioners' lost apartment income, failing to adjust rental rates upon income (caused by vacancies of three apartments over the

7/ - Defendants were council members on the LPA ("Local Public Agency") and Office of Community Development, administering the renewal. Only three of eighteen displaced businesses would relocate within Oceanport by 1980.

tavern due to the project);[8/]

(c) Exercising set-offs of accrued rental charges from a three-month damage award secured by petitioners against the locality, a temporary relocation hiatus, in violation of 24 CFR 42.180;[9/]

In addition to these relocation assistance denials, the defendants were also obligated to establish an effective relocation assistance advisory program for business reestablishment. The overwhelming weight of the evidence at trial showed that four, not five inadequate alternative locations were referred by defendants in this program for placement of petitioners' license, to-wit:

(a) The Arnold and Stalder Properties;

(b) The Teicher Complex;

(c) The Monmouth Park Track Property.[10/]

8/ The rentals charged were not based upon hardship or ability to pay, violating the regulations.

9/ 24 CFR 42.180 specifies that the LPA cannot set off claims unless court proceedings are instituted to collect rentals.

Overwhelming evidence at trial showed that the fifth location, the "Kincaid" tract the defendants failed to refer during 1973-1974, when petitioners were investigating options for relocation of the license during condemnation.[11]/ The defendants admitted "Kincaid" was zoned commercial, that they knew it was available, and Mr. Heaslip, a real estate witness, testified its location was especially valuable to petitioners. Another displaced licensee, Mr. Bataas, testified it also was never referred to him by defendants before its sale to Monmouth Park in November, 1974.[12]/

10/ These properties were economically infeasible, subject to wetlands building moratoriums, and costly,with the Teicher site not allowing petitioners to carry on their prior food and apartment rentals and package liquor store operation. The Monmouth Park property was never available for either sale or rental, as a "sham" referral.

11/ Pietroniro testified clearly "Kincaid" was never referred, that he did not purchase same since he was not aware it was available until after it was sold to the Track in 1974, and it was not mentioned in Sylvain's referral correspondence in evidence before the November 1974 sale.

Because the LPA never referred him to the property, Bataas spent a year and a half obtaining the appropriate information and arranged a meeting with Baxter and Sommers to find out if the town would object to his relocating at "Kincaid". He testified that almost immediately after the meeting, the Track (Monmouth Park) bought it:

> A.."They (the mayor and council) said it didn't seem bad to them.. The next thing I know(the property) it's gone.."
> Q. Somebody else bought it?.."
> A.. and somebody in that office.. that I was sitting in, is what I was trying to get to before, told the race track I was going to buy it..One of the Township Fathers, who are very near and dear to that race track, and the race track paid more than I offered.."
> (Record A713, A714, A686, A687)

Defendants offered in evidence a March 25, 1975 letter from Leone to Piet where Leone asserted he had previously mentioned Kincaid.##/ He admitted federal information required (costs, square feet)

##/ The letter, coming three months after its sale to the Track, was completely self-serving and Pietroniro testified it was a lie.

was not provided to Piet. Due to petitioners' lack of knowledge upon the availability of tne Kincaid tract, the petitioners made numerous attempts to secure a parcel in the Ratti renewal area, located around commercial uses and under defendants' control.

Defendants refused to release any Ratti parcels for sale options to petitioners. At the same time, they extended preferential purchase options on one residential lot to similarly displaced professional commercial operators, subject to them obtaining a commercial variance for development. To facilitate the variance, over which defendants had final approval, defendants gave this select class certain recommendations as a catalyst for variance concurrence to the

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12/ Ratti parcels remain vacant and undeveloped to date. The failure of defendants to refer "Kincaid" and the "Ratti" area violated 42 USC 4625, 24 CFR 42.115. These statuttes require maximum assistance be rendered to assist displacees in obtaining a suitable replacement location under the 49 per cent ratio, and require information on availability and land costs over which defendants had exclusive control in the Ratti renewal area. (EMPHASIS)

Board of Adjustment as relocation assistance. Said recommendations were made through the use of the relocation assistance advisory program. Such was accomplished, with the council approving the variance and bringing their own advisory service recommendations to fruition.[13]/

The LPA defendants' influence went full circle. Quite simply, petitioners were entitled to the same and not disparate relocation assistance advisory service and similar purchase options within and under Congress' national goals developmental 49 per cent commercial ratio. The conduct of the defendants in denying petitioners proper assistance has resulted in a denial of equal protection, depriving petitioners of the use, benefit and enjoyment of their license without

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[13]/ Although different members comprised the Board, the recommendations by the LPA defendants and their final approval was the catalyst for the Board's concurrence as to commercial use, facilitated through the relocation advisory program.

due process of law.

B. FEDERAL APPELLATE PROCEEDINGS

The Appeals Court's opinion turned solely on the question of whether or not petitioners were entitled to the same assistance given the professional commercial operators. The Court answered in the negative, ruling there was insufficient evidence to support the verdict, mistakenly treating "Kincaid" as a stipulated referral instead of a non-referral and violation:

> " The parties have further stipulated that Piet was referred to five alternative locations...Piet concedes it knows of no feasible alternative location to which it was not referred by the LPA, and admits that the only acceptable alternative location was a residential parcel (referring to a "Ratti" renewal parcel)..The understandable decision to allow a doctor's office rather than a bar to locate in a residential neighborhood is not an abuse of the municipality's discretion.." (App. pp. A19,A15)
>
> " Absent some evidence that the defendants did not provide Piet with assistance in obtaining an existing suitable location, there is no basis for finding that there has been a failure to provide the relocation assistance mandated under federal law.."(App. pp. A19). (EMPHASIS ADDED)

The Appeals Court has ruled, as a matter of law, that initial zoning in the renewal area overrides the statutory obligations to render maximum assistance to assist in business displacees obtaining a suitable replacement location. The decision effectively obliterates Congress' 49 per cent commercial national goals program for renewal projects. It confers "infettered discretion" upon the locality without articulating any standards for review of the municipality's actions that have been heretofore articulated by the United States Supreme Court, examined as a basis for review upon certiorari.[14/]

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[14]/ This writer believes that a referral location can be a comparable commercial one, facilitated by variances gotten through advisory assistance within and juxtaposed against the 49 per cent commercial Congressional mandates of the national goals program. Zoning is not fixed and can be modified to facilitate same as the need arises, as it was so changed to help the similarly situated professional commercial displacees. (See record testimony on page 9, 10)

If resources are available for the relocation of a select group, such operates as a direct admission that the defendants had the ability to extend the same type of relocation opportunities to petitioners, but summarily foreclosed them from same. (e.g. the opportunity to purchase a parcel and then apply for a variance under the 49 per cent program)[15]/

Subsequently, in a Petition for Rehearing In Banc, these issues were brought to the attention of the Appeals Court, which denied Rehearing without opinion on July 18, 1985.

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[15]/ This decision has detrimental ramifications affecting the entitlements of all business displacees under federal renewal projects under Congress' 49 per cent program. It is also important to note that the overwhelming weight of evidence at trial demonstrated that the "Ratti" renewal area was not residentially predominated. It was surrounded by commercial uses, such as a corner gas station allowed to remain through variance, the professional commercial operators allowed to operate through variance and it was 200 yards from commercial property housing the Turf Bar, built on the Arnold Property in 1978 after the wetlands moratorium was lifted.

REASONS FOR GRANTING THE WRIT

The Third Circuit's opinion has created a conflict in the Circuits, has adversely affected Congress' national goals program and the Third Circuit has failed to utilize Supreme Court standards, deciding a federal question under federal laws in conflict with its decisions. The Supreme Court should now settle and decide the important questions of federal law under the Housing Act and Uniform Relocation Assistance Act presented herein on behalf of all business displacees.

The constitutional rights implicated in this case are petitioner's due process and equal protection rights to be accorded similar assistance under national goals as that given the professional commercial displacees under the 49 per cent ratio. Both are in the same class, similarly displaced, needing the opportunity to purchase a renewal parcel to relocate within the 49 per cent ratio. District and Circuit Court decisions construing same have recognized this principle

and conflict with the Third Circuit's interpretation.[16] In Home Furniture v. HUD, 324 F. Supp. 1401 at 1404 (D.C. N. Car. 1971), where there were not enough relocation sites for business displacees unless defendants made land under their control available to them within the 49 per cent ratio, the Court imposed this upon the locality as an affirmative obligation to discharge statutory responsibilities:[17]

> "..(That defendants)..must allow businesses, singly or in groups,to relocate and return to the redevelopment area (renewal area) as one of the live options to discharge their statutory responsibilities.." (within the 49 per cent commercial context) Home Furniture v. HUD, 324 F. Supp. at 1404 (D.C.N.Car. 1971)

Furthermore, in M. Crockin Co. v. Portsmouth Redevelopment Authority, 437 F.2d. 789, (4th Cir. 1971), a business displacee desiring to buy a renewal parcel was allowed to

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[16] The federal relocation statutes must be read in conjunction with Congress' national goals program so that they are given their full statutory intent and effect.

[17] The municipality's desire for open space is not jeopardized since national goals only prescribe commercial redevelopment within a maximum of 49 per cent of the renewal area.

contest the municipality's proposed use of the parcel in question for parking, used to preclude Plaintiff's purchase.[18/] The Fourth Circuit, conflicting with the Third Circuit opinion in this case, did not rule, as a matter of law, that the municipality has "unfettered discretion" to bar Plaintiff's purchase overtures just because defendant's proposed uses on the parcel were consistent with the parcel's initial zoning.[19/] The Crockin Court concentrated upon the appropriateness of the use as a question of fact measured and juxtaposed against Congress' 49 per cent national goals program for commercial redevelopment. The Third Circuit opinion conflicts because it states, as a matter of law that all uses incompatible with initial zoning are unjustified and need not be

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[18/] The Plaintiff could contest the defendants' proposed use for parking even though same was consistent with the parcel's zoning, as a question of fact. The Fourth Circuit did not treat initial zoning as solely indicative of appropriateness of use, conflicting with the Third Circuit.

considered in evaluating an authority's relocation plan. This negates national goals and defendants' statutory responsibilities to update referrals, render maximum assistance and gauge the effectiveness of the program. It also conflicts with other decisions in the Circuits wherein the question of suitableness or unsuitableness of relocation referrals are matters of fact, not law.[20]/ Had the Crockin Court adopted the Third Circuit's reasoning, the Crockin plaintiff would have been defeated as a matter of law because the defendant's proposed parking use for the parcel in question was consistent with initial zoning and use designations as the one and only overriding concern in the analysis by Third Cir-

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[19]/ The Third Circuit specifically ruled, as law, that the municipality's estimations of use appropriateness governed the defendants' statutory referral obligations, directing conflicting with Crockin's interpretations.

[20]/ Decisions include: Smith v. Mo. State Highway Com., 488 S.W. 2d. 230 (Mo. 1972); Tullock v. Mo. State Highway Com., 507 F. 2d. 712 (6th Cir. 1974).

cuit standards. The Fourth Circuit stated:

> "In light of ..allegations plaintiff needed certain assistance..the defendants recognized and had ability to grant..alleging that only a particular area of land was feasible for relocation..Plaintiffs were allowed to contest this..to show defendants did not comply with statutes governing the services they used to carry out their statutory obligations..".
> 437 F.2d. 789 (4th Cir. 1971)

The opinion of the Third Circuit also indicates the legality of the relocation plan should be considered in light of whether or not defendants had the ability to grant the assistance under Crockin.(App. pp.A16). The opinion then erroneously indicated that only the Adjustment Board could grant the assistance for variances.[21]/

[21]/ Trial testimony and variance documentation showed defendants did have the ability to aid as: (1) the body granting final variance approval for commercial use after Adjustment Board concurrence; and (2) the body having control over renewal land release in the first instance, using the relocation advisory program to make commercial recommendations to the Adjustment Board as the catalyst to elicit its concurrence upon commercial use on renewal parcels.(Pietroniro testimony at A741-744). Piet should have been permitted a purchase contract on a lot subject to obtaining a variance like the professional commercial operators got.

Defendants have the duty to render maximum assistance to suitable replacement locations:[22]/

> "..Where defendants submitted applications to "HUD" for funding, including that they would advise and assist commercial tenants in relocation matters and insure their satisfactory relocation, defendants' obligations were not discharged by the mere writing in of these broad relocation committments.. their obligation was to also satisfactorily perform this undertaking, for without proper execution, the statutes fail to achieve their purpose..". 437 F.2d. 789 (4th Cir. 1971),Crockin, supra.

Most signifigantly, the Third Circuit opinion conflicts with Battison v. Niles, 445 F. Supp. 1080 (D.C.N. Ohio 1977). In Battison,a displaced liquor licensee,after submitting development plans, was denied a purchase option on a commercial relocation parcel due to defendants' improper

[22]/Defendants contended at trial that "comparability" was not a consideration in referral location sites,directly violating 42 USC 4625, 24 CFR 42.115 wherein defendants are to render maximum assistance for the business to obtain a suitable replacement site with a minimum of delay and loss of earnings.Testimony of Sylvain at(A2503-A2505).Piet should have been referred to "Kincaid" in the advisory program.

pecuniary motives. The Battison Plaintiffs were then also referred to economically infeasible sites while preferences for relocation were extended to other select commercial operators.[23]/ Such amounted to a denial of proper relocation services:

> "..Where the council's refusal to relocate was prompted by political motives rather than the proper legislative concerns..where conditions imposed on owners made it economically infeasible for them to relocate..and where council extended preferences to some that it did not extend to other business displacees, council denied owners effective relocation assistance..".445 F. Supp. 1080 (D.C.N. Ohio 1977)

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[23]/ Defendant Sylvain told Pietroniro not to submit plans on renewal parcels because the defendants refused to offer a parcel for sale to petitioners in the first instance. These refusals effectively precluded any further relocation steps. Piet, denied a sale option under the 49 per cent commercial ratio, suffered disparate treatment as compared with the assistance given the professional operators within the 49 percent commercial operation ratio. Battison principles hold true, no matter whether defendants release parcels under sale option designated as commercial or residential, subject to the obtaining of a variance as the select group's purchase option was structured. Piet should have been extended a similarly structured purchase option for maximum relocation assistance that defendants had ability to grant.

The Third Circuit's departure from decisional consistency is one basis warranting review upon certiorari.

Additionally, the Third Circuit has failed to articulate standards for its conclusion that, as a matter of law, preferential advisory assistance is permissable within the locality's unfettered discretion to allow professional commercial displacees to relocate in the renewal area under the 49 per cent ratio and not petitioners. (App. pp. A17)[24/] The Supreme Court has articulated certain standards for review that are deleted from the opinion, to-wit:

> (a) Has there been uniform operation or arbitrary non-adherence to national goals ratios initiated by Congress?

[24/] The United States Supreme Court has ruled that legislative considerations lie within the relevant scope of constitutional limitation. There is no plenary power of the locality to manipulate in every conceivable way for every conceivable purpose. Gomillion v. Lightfoot, 364 U.S. 339, 344-345, 81 S. Ct. 125, 128 (1960); Garren v. City of Winston-Salem, 463 F.2d. 54 (4th Cir. 1972) The 49 per cent commercial ratio developmental standard is not discussed in the opinion in relation to the defendants' statutory obligations.

(b) Have there been arbitrary selections for commercial and non-commercial uses?

(c) Have there been applications of the advisory assistance statutes by defendants which produce indefinite, uncertain or unnecessary interference with the vested interests of the licensees to carry on their lawful business or use and enjoy their licenses, which is not warranted in the public interest?

Daly v. Elton, 195 U.S. 242, 25 S. Ct. 22; Dobbins v. Los Angeles, 195 U.S. 223, 25 S. Ct. 18; Reinman v. Little Rock, 237 U.S. 171, 35 S. Ct. 511. 25/

The analysis is whether or not the defendants' failures to extend purchase options to petitioners on a renewal parcel, and whether their failure to refer the "Kincaid" tract under federal law are mere excuses for unjust discrimination, oppression and spoliation of members of the commercial displacee class, namely, the licensees, whose licenses gave them no options but to relocate within Oceanport's boundaries.

25/ The Supreme Court tests encompass whether or not the licensees were denied equal protection and due process as compared with the great and preferential assistance given to others similarly situated. Reinman, above; Elmwood Properties v. Conzelman, 418 F.2d. 1025 (7th Cir. 1969).

Failing to adhere to Circuit and Supreme Court standards, the Third Circuit has decided a federal question in conflict therewith. The Supreme Court should now decide these important questions of federal law under Congress' national goals program and the federal relocation acts.

Another consideration to be noted is petitioners own a liquor license they could not relocate because defendants:

(a) refused to offer renewal land under their control for purchase subject to the obtaining of a variance under the 49 per cent commercial ratio; and

(b) failed to properly refer the "Kincaid" property, a comparable commercial replacement location, thus violating 42 USC 4625 (c), 24 CFR 42.105, 42.115.

Decisions indicate that an existing vested license interest represents a fundamental property interest to pursue the calling of one's choice, protected under the Fourteenth Amendment's due process

guarantees. Eisen v. Eastmen, 421 F.2d. 567 (2d Cir. 1969); Glicker v. Michigan Liquor Control Commission, 160 F.2d. 96 (6th Cir. 1969); Hornsby v. Allen, 326 F.2d. 605 (5th Cir. 1969); Shamie v. Pontiac, 620 F.2d. 118, (6th Cir. 1980); Bell v. Burson, 402 U.S.535, (1971).

The defendants' failures to accord equal measures of relocation assistance to displacees have denied petitioners their licensee rights without due process of law. The petitioner's loss of license use and signifigant gainful employment opportunities through statutory failures of the municipality under federal law have resulted in a loss of liberty and property to petitioners.[26]/

[26]/ Prior decisions in the Circuits indicate displacees have causes of action for denials of equal protection and personal rights if federal statutes providing for proper relocation services are being breached. Barnes v. Tarrytown Urban Renewal Agency, 388 F. Supp. 275 (D.C.N.Y. 1971); English v. Town of Huntington, 335 F. Supp. 1369 (D.C.N.Y. 1970); Ka-Haar v. Huck, 345 F. Supp. 54 (D.C.Wisc. 1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Paul v. Davis, 424 U.S. 693(1976).

CONCLUSION

The United States Supreme Court is urged to review and settle the important questions of federal law presented within this Petition under the Uniform Relocation Assistance Act of 1972, the Housing Act of 1949 and the national goals program established by Congress on behalf of all business displacees under federally funded programs in this country.

In the interests of justice, and for all of the foregoing reasons presented herein, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

RESPECTFULLY SUBMITTED,
FRANK PIETRONIRO,Pres.,
MARY PIETRONIRO,
PIET CORPORATION
Petitioners

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APPENDIX

INDEX TO APPENDIX

Opinion of the Court of Appeals for the Third Circuit, rendered on June 18, 1985.....A1

Petition for Rehearing With Suggestion for Rehearing In Banc filed July 1, 1985.....A25

Order Denying Rehearing dated July 18, 1985.....A48

Jury Verdict rendered in the US District Court for the District of New Jersey on October 17, 1983.....A49

United States Court of Appeals
for the Third Circuit

No. 83-5926

Frank Pietroniro, Vice-Pres., Mary Pietroniro, President, Piet Corporation

Appellees

v.

Borough of Oceanport, Clement Sommers, Elwood Baxter, Louis Sylvain, George Barrett, Nicholas Leone

Appellants

v.

US Department of Housing and Urban Development

On Appeal from the US District Court for the District of New Jersey

No. 79-1836-1840

Opinion on Appeal filed on June 18, 1985.

OPINION OF THE THIRD CIRCUIT

A. LEON HIGGINBOTHAM JR. Circuit Judge:

Piet Corporation ("Piet"), a N.J. corporation, brought this action for damages, and declaratory and injunctive relief under 42 USC 1983 (1982) against the Borough of Oceanport ("Oceanport") NJ and certain public officials who were administering Oceanport's urban renewal program.[1] / Piet, through its sole shareholders and corporate officers-Frank and Mary Pietroniro-charged that the defendants illegally deprived them of property by their failure to provide effective relocation assistance as required by the Housing Act of 1949, 42 USC 1455 (c)(1) (1982), the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1972, 42 USC 4625 and the applicable federal regulations 24 CFR 42.1 et.seq. (1971). A jury rendered a verdict for the Plaintiffs for $197,950.00.

1/ Third party defendant, US Department of Housing and Ubran Development was granted summary judgment on March 30, 1981 and is not a party to this appeal.

The district court entered judgment and denied the defendants' motions for judgment notwithstanding the verdict and alternate motion for new trial. Despite the complexity and novelty of the issues in this case, the district court filed no opinion, either oral or written, to explain the basis for his denial of the post-trial motions. Because we find, as a matter of law, the evidence was insufficient to support the conclusion that Piet was denied relocation assistance as required by law, we now reverse the judgment of the district court.

I.

Piet Corporation owned and operated a combination package store, bar and tenement business (consisting of three apartments) in Oceanport, NJ from July 1961 until July of 1975. The Piet property was located in the downtown business district which in 1972 was a blighted area that consisted of several small businesses, a few gas stations and abandoned properties.

Defendant Elwood Baxter became Mayor of Oceanport in 1972 and the Oceanport Council then included defendants George Barrett and Clement Sommers. Sommers became a Councilman in 1960 and remained a Councilman until January 1, 1976, when he replaced Baxter as Mayor. Barrett served as Councilman until 1978. The offices of Mayor and Councilman were part-time positions paying a salary of $250 per year.

Beginning in February 1972, the Council held public hearings concerning urban renewal proposals. Frank Pietroniro attended at least one such hearing on Behalf of Piet. The Borough of Oceanport approved an urban renewal plan in June, 1972 and in September the program received Department of Housing and Urban Development approval ("HUD") and bacame operational under the Neighborhood Development Program, Project No. NJA-15.

The Mayor and Council served as the Local Public Agency ("LPA") for the admin-

istration of the Neighborhood Development Program ("NDP") Baxter, as Mayor, served as the initial Chairman and Barrett and Sommers served as members. Baxter had no vote at Council meetings except in the event of a tie. As chairman of the LPA he did have a vote.

The LPA delegated the day-to-day administration of the Oceanport NDP to the "Oceanport Redevelopment Agency", which later became the "Oceanport Office of Community Development". On October, 1972, the LPA hired defendant Louis Sylvain as Executive Director of the Redevelopment Agency; he served in that capacity until May 1980. The defendant Nicholas Leone was hired in April 1973 as Relocation Officer and shortly thereafter was made Assistant Director. In 1976, Leone ceased his involvement in the program. HUD monitored the program.

The urban renewal plan called for the demolition of several properties, including Piet's. Eighteen businesses and

forty residences were displaced. The former business district was rezoned for residential use. Negotiations between the Borough and Piet over the removal and relocation of the business began in 1973 and have been the source of much controversy and hostility among the parties. Since the implementation of the NDP, there have been disputes over the adequacy of the compensation offered for Piet's real property, allegations of official harrasment, conspiracy and unethical conduct, and charges that the relocation assistance provided by the Borough as required by federal law was a "sham" designed to obscure the machinations of sinister political plots.

At the time of its eviction on July 2, 1975, Piet had received from Oceanport $95,885.13 in displacement payments, including a $58,225.00 (plus interest) award for the land and building as determined by a judgment in state court con-

demnation proceedings. Piet did not receive compensation for the value of its liquor license or the licensing fee, but was allowed to retain the license in order to relocate the business, or, in the alternative, sell it to a suitable party. [2]/

II.

A claim for damages resulting from the destruction of a business is an appropriate action under 42 USC 1983. Where a party seeks to compel compliance with conditions set forth in a federal statute, however, we must first determine whether the statute at issue provides for a private cause of action to compel state compliance with those conditions, or whether the appropriate remedy is an action by the federal government to terminate funds provided to the state under the act. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 27-28 (1981)

Piet cites four sources of Federal law

[2]/ Piet owned a "Broad C" liquor license. Broad C licenses are the most valuable class of liquor license in NJ because it allows the licensee to sell both over-the-counter

as conferring upon it certain interests that are rights protected by 42 USC 1983: the Housing Act of 1949, 42 USC 1455 (c) (1) [3]; the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("URA"), 42 USC 4625 [4]; HUD regulations 24 CFR 42.

---

drinks and package goods. Piet's expert testified at trial that this license is currently worth $100,000.00 if a suitable location can be found. In the ten years since its eviction, Piet has neither relocated nor sold the license and continues to pay a yearly licensing fee to the State of NJ. Although a 1978 law passed by the State of NJ automatically retires dormant licenses after one year, Piet has successfully enjoined enforcement of this statute pending final disposition of this case.

3/ 42 USC 1455 (c) (1) provides in pertinent part:

> "There shall be established..for each urban renewal project involving the displacement of individuals, families and business concerns occupying property in the urban renewal area, a relocation assistance advisory program which shall include such measures, facilities and services as may be necessary and appropriate in order (A) to determine the needs of such individuals, families and business concerns for relocation assistance; (B) to provide information and assistance to aid in relocation and otherwise minimize the hardships of displacement..and (C) to assure the necessary coordination of relocation activities and other planned or proposed governmental actions in the community which may affect the carrying out of the relocation program....

100, 42.105, 42.115 (1971); and the HUD Relocation Handbook. These require municipalities which receive federal subsidies for urban renewal projects to provide a relocation assistance program for businesses displaced by the project.

> (3) Within one year after (the date of enactment of this paragraph) Dec. 24, 1969, and every two years thereafter, the Secretary shall review each locality's relocation plan under this subsection and its effectiveness in carrying out such a plan."

42 USC 4630 similarly requires:

> Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract with or agreement with, a State Agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person.. unless he receives satisfactory assurances from such State Agency that--
>
> (2) relocation assistance programs offering the services described (in 42 USC 4625) shall be provided to such displaced persons.

42 USC 4625 provides in pertinent part:

> (c) Each relocation assistance advisory program shall include such measures, facilities or services as may be necessary or appropriate in order to--(1) determine the need, if any, of displaced persons for relocation assistance;
> (2) provide current and continuing information on the availability, prices and rentals..of comparable commercial properties and locations for displaced business;

This regulatory scheme does not, however, provide a mechanism by which the federal administrative authority charged with enforcing these conditions on the state--HUD--can appropriately investigate and respond to the claims raised by persons in Piet's position. The grievance and appeals procedure set out in 24 CFR 42.190 (1971) provides only for HUD reconsideration of state agency determinations as to relocation payments under the regulations. In the abscence of a comprehensive enforcement scheme within the regulatory scheme which encompasses the plaintiff's complaint, there exists a private cause of action against state officials for violations of the Housing Act and the URA. Maine v. Thib-

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(4) assist a displaced person displaced from his business.. in obtaining and becoming established in a suitable replacement location;
(6) provide other advisory services to displaced persons in order to minimize hardships to such persons in adjusting to relocation.

5/ See 42 USC 1455 and 42 USC 4625, in notes 3-4 supra.

outot, 448 U.S. 1 (1980). See also Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, 19-21 (1981).

Nor is the claim barred by a failure by plaintiffs to exhaust federal administrative remedies. Where administrative channels are inadequate to resolve issues which are not within the expertise of courts, a party is not required to exhaust administrative review. 4 K. Davis, Administrative Law Treatise, 26.11 (1983). So long as HUD approves the program established by the LPA, there is no procedure designed to redress allegations that the program is being administered improperly. Indeed, in response to Piet's complaints in this case, the director of HUD's Community Planning Development Division denied Piet's request for a hearing on the issue of relocation assistance because the amount of relocation payments was not in dispute, and the LPA had assured HUD that it had provided maximum assistance in the form of referrals to realtors and possible relocation sites. There is no suggestion in the

laws or regulations that the program's administration is a matter of agency discretion nor is judicial review precluded. Where judicial review is not precluded in the first instance, the agency's actions are not discretionary and the administrative channels which exist are inadequate to resolve a complainant's grievance, a party is not required to exhaust all avenues of administrative review before bringing the matter to federal court. M.M. Crockin Co. v. Portsmouth Redevelopment Authority, 437 F.2d. 784,788,(4th Cir. 1971); Tokarcik v. Forest Hills School District, 665 F.2d. 443, 447 n.5 (3rd Cir. 1981).

III.

An inherent sequela of urban renewal is that there will not be absolute replication of what previously existed. There are some losses in the process. Our constitution requires that persons evicted from their property by the government for purposes in the public good be fully compensated for their losses. Condemnation is the usual

remedy in such cases. Relocation assistance, is a supplement and, though an important option, is not a guarantee of relocation for affected businesses. The Housing Act and the URA do not require that the government "tender" or "obtain" a replacement location; they require "only assistance" and not assistance guaranteeing a successful result." American Dry Cleaners and Laundry v. US Department of Transportation, 722 F.2d. 70, 73 (4th Cir. 1983).

To minimize hardship and assure that individuals will not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole, Congress has required that owners of real property which is acquired for federally funded or assisted renewal projects be provided certain relocation assistance.[5] To implement these objectives, HUD promulgated a series of regulations, codified at 24 CFR 42.1 et. seq. (1971)[6]

6/ The original regulations as promulgated in 1971 govern this case and all displacements occurring before 1979. Except where noted, all subsequent citations to HUD regulations

The regulations require that states receiving federal funds for urban renewal develop and implement a relocation assistance advisory program which provides "maximum assistance, to minimize the hardships of displacement". 24 CFR 42.105. Among other things, these regulations established the minimum requirements of relocation assistance advisory programs. 24 CFR 42.115.All property owners are not, however, entitled to the same assistance. Resident displacees are assured that "within a reasonable period of time prior to displacement, there will be available adequate replacement housing.. equal in number to the number of and available to, such eligible persons who will be displaced.."24 CFR 42.115(d)(emphasis added) Displaced business concerns are not guaranteed a replacement site. The public agency is obligated to do no more than "provide current and continuing information on the availability..of comparable commercial

are to the 1971 versions. The updated regulations, codified in 1979, do not apply to pre-1979 displacements. See 24 CFR 42.3 (1979).

properties and locations" and to "assist any such eligible person displaced from his business.. in obtaining and becoming established in a suitable replacement location". 24 CFR 42.115 (c) and (e) [7]/.

The district court accurately and exhaustively instructed the jury on the law regarding effective relocation assistance. The question before us is "whether, as a matter of law, the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." Patzig v. O'Neil, 577 F. 2d. 841, 846 (3d Cir. 1978) After a careful review of the record, viewed in the light most favorable to the plaintiffs, we conclude that the evidence was insufficient to support the jury's verdict. [8]/ It is not

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7/ See also 42.105 which states:
"State agencies shall develop and implement a relocation assistance advisory program which satisfies the requirement of 42.115 and of title VI of the Civil Rights Act of 1964 and title VIII of the Civil Rights Act of 1968. Such programs shall be administered so as to provide advisory services which offer

disputed that Oceanport implemented a relocation plan, including an advisory assistance program, that was approved and monitored by HUD. The parties have further stipulated that Piet was referred to five alternative locations and several local realtors by the LPA in their attempts to relocate the business. Conceding, as it must,

> maximum assistance, to minimize the hardships of displacement, and to assure that (a) all persons displaced from their dwellings are relocated into housing meeting the criteria described in 42.120, and (b) all persons displaced from their places of business or farm operations are assisted in reestablishing with a minimum of delay and loss of earnings. (Emphasis added) These requirements are reiterated in a Relocation Handbook published by HUD in 1971 which also contains guideforms designed to facilitate compliance with the federal regulations.

8/ Piet sought to recover for diminished value of the liquor license, license fees paid, lost profits, and for personal injury (an ulcer) suffered by Frank Pietroniro. As all of the damages were allegedly caused by breach of the statutory duty to provide relocation assistance, and no other statutory or common law causes of action are advanced, the entire verdict depends on the finding of a breach of the statutory duty.

9/ Piet calculates "economic feasibility" by weighing the necessary investment against the anticipated revenues from operating a taproom and package store on the site.

that as a comercial displacees it was not guaranteed a replacement property under federal law, Piet nevertheless contends that the LPA failed to provide the "maximum assistance" required by 42.105. This claim is based on two somewhat intertwined theories.

In the first instance Piet asserts that none of the locations to which it was referred by the LPA was economically feasible.[9/] In fact, Piet believes that there is only one feasible alternative location in Oceanport, namely the so-called "Ratti Tract" which lies virtually across the street from Piet's former location. The virtues of the Ratti Tract in Piet's view are that it is initially affordable and favorably situated so as to provide a volume of business that will make the new venture economically feasible. The only stumbling block to a satisfactory resolution of Piet's problem is the undisputed fact that the Ratti Tract has been zoned

for residential use and Piet has been advised that the Oceanport Board of Adjustment would refuse to grant a commercial variance to accommodate Piet's liquor license.

We agree that a displaced business should be given an opportunity to establish that the public authority has failed to comply with both the federal regulations and its own relocation plan when it refuses to make available the only parcel of land allegedly feasible for the relocation of a business. M.M. Crockin Co. v. Portsmouth Redevelopment and Housing Authority, supra. As Crockin noted, the legality of the relocation program in this type of case should be considered in light of whether the public authority had the ability to grant the assistance requested; whether the proposed use for the site comports with the use for which the parcel is designated in the urban renewal plan; and whether the authority's proposed use is

compatible with that plan.

Piet's claim fails under these criteria. Since Piet's proposed use was incompatible with the use for which the Ratti Tract was designated, the LPA cannot be faulted for failing to refer Piet to that location. Moreover, it is undisputed that Piet was well aware of the unavailability of the Ratti Tract, and had been so informed by the LPA, which also informed Piet that it was unlikely a liquor license could be relocated on the site because of the zoning restrictions. In addition, the LPA was powerless to provide Piet with any more assistance. Only the Oceanport Board of Adjustment could grant the zoning variance necessary for Piet to relocate on

10/ The Oceanport Board of Adjustment was an independent entity which was not subservient to the LPA. During the time relevant to this case, the two bodies shared no common members and no member of the Board of Adjustment is an individual defendant here.

the Ratti Tract.[10] Finally, Piet relies on the fact that the ultimate purchasers of a parcel on the Ratti Tract, two doctors who had also been displaced by the urban renewal project, were granted a commercial variance in order to erect a commercial building for the site on which they located their offices.[11] While we agree that Piet was entitled to the same considerations with regard to relocation assistance as any other commercial displacee, we cannot impute any discrimination made by the zoning board to the LPA. Moreover, it is well within the discretion of the municipal zoning board to grant a variance that allows doctor's offices to be relocated in a residential area, and not a bar and liquor store. In these

11/ Since Piet did not bid for the Ratti Tract parcel sold to the doctors, it could not apply for a variance. Thus, it never applied for and was thus never denied a commercial variance for the Ratti Tract. In effect, Piet alleges here that its desire to purchase the property was chilled because municipal officials made it known that a variance would not be granted for the liquor license.

circumstances, we do not believe that the jury could reasonably find that failure to refer Piet to the Ratti Tract amounted to a failure to provide relocation assistance required by law.

Piet's second theory presents us with a somewhat closer case. It is alleged that the defendants acted in bad faith in the administration of the urban renewal program. There is evidence that indicates that during 1972 public hearings Mayor Baxter and others misrepresented to those in attendance that the urban renewal plan contemplated allowing certain existing businesses to remain in the redeveloped zone. There is further testimony that Piet was the target of official harrassment during its eviction proceedings and that the LPA and Office of Community Development violated various HUD regulations in the administration of the relocation plan. Additionally, there is evidence that several of the

sites to which Piet was referred for relocation were clearly incompatible with his needs. For example, two sites were located on tidal lands that regularly flooded and which could not be filled due to a statewide moratorium prohibiting the filling of waterfront properties. Most troublesome, however, is the evidence that some of the defendants may have used their positions of public trust for provate advantage. In 1980 Mayor Sommers purchased an inactive liquor license from the Monmouth Park Jockey Club. It is alleged that he was able to negotiate a bargain purchase price because there were several inactive liquor licenses in Oceanport, including Piet's, which were soon to be retired under NJ law if not put in active use. Thus it is alleged that Sommers directly benefitted from Piet's failure to relocate. There is other testimony that defendant Leone and defendant Barrett, who was in the real

estate business, proposed that Piet sell his license at a deflated price to one of Barrett's clients.

The thrust of these accusations is that the defendants' actions with regard to Piet were prompted by private and political motives that made it impossible for Piet to receive adequate relocation assistance. While we recognize that there have been cases in which it was found that effective relocation assistance was not provided where public officials acted pursuant to political motivations rather than the proper legislative concern, see Battison v. City of Niles, 445 F. Supp. 1080 (D.C.N.Ohio 1977), this case lacks the necessary causal nexus between the defendants' conduct and the plaintiffs' damage. Most signifigantly, Piet concedes it knows of no feasible alternative location in Oceanport to which it was not

referred by the LPA, and admits that the only acceptable location was a residential parcel. As we stated earlier, the understandable decision to allow a doctor's office rather than a bar to locate in a residential neighborhood is not an abuse of the municipality's discretion. Absent some evidence that the defendants did not provide Piet with assistance in obtaining an existing suitable location, there is no basis for finding there has been a failure to provide the relocation assistance mandated by federal law. See American Dry Cleaners and Laundry v. US Department of Transportation, 722 F.2d. at 72-73.

CONCLUSION

Because we find that the evidence is insufficient to support the jury's verdict, the judgment of the district court will be vacated with directions to enter a judgment in favor of appel-

lants, Each party to bear its own costs.

A True Copy:

Teste:

Clerk of the US Court of Appeals
for the Third Circuit

United States Court of Appeals
for the Third Circuit
Docket No. 83-5926

Frank Pietroniro,
Mary Pietroniro,
Piet Corporation

Plaintiffs-
Respondents

v.

Borough of Oceanport,
Clement Sommers, Elwood
Baxter, Louis Sylvain,
George Barrett, Nicholas
Leone

Defendants-
Appellants

Petition for Panel Rehearing
With Suggestion for Rehearing
In Banc

On Appeal from the US District
Court for the District of
New Jersey

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Statement of Jurisdiction

Jurisdiction is conferred upon this Court pursuant to 28 USC 1331, 1343, and 42 USC 1985.

Statement of Issues Presented on Rehearing On Appeal

A statement of issues presented on the appeal in this case is set forth in my initial appellate brief.

The issue presented on this rehearing is whether there was a causal connection between the defendants' wrongdoing and plaintiffs' injury. This is more specifically stated as two alternative issues:

1. Whether defendants' wrongful failure to refer plaintiff to the Kincaid Property prior to its sale on November 29, 1974 caused Plaintiffs' injury by denying him an opportunity to relocate there, and/or:

2. Whether defendants' misrepresentations caused plaintiffs' injury by en-

abling the defendants to secure approval and funding for its redevelopment program.

Statement of the Case

This appeal was heard by a three-judge panel. This is a request for a panel rehearing with suggestion for rehearing in banc. The appeal was from a judgment entered on November 28, 1983 in the US District Court of NJ in favor of Piet Corp and Mr. Frank Pietroniro, pursuant to a jury award rendered on Oct. 17, 1983. The three-judge panel, after the initial hearing, in an opinion filed June 18, 1985, reversed said judgment.

Statement of the Facts

A comprehensive statement of facts is set forth in my initial appellate brief. The essential facts are as repeated below.

In 1972, the Borough of Oceanport("Oceanport") applied for funding from the US Department of Housing and Urban Development ("HUD") for a redevelopment project. To obtain the approval of HUD and Oceanport's townspeople, defendants made fraudulent promises to relocate businesses displaced by the project. Under 42 USC 1455, defendants became obligated to make site referrals to comparable locations and to provide maximum assistance to displaced businesses. 42 USC 1455, 4625, 24 CFR 42.105, 115. (A290 (A2903-2906, A2244).

Plaintiff Piet Corp. ("Piet") operated a bar and was served with

Oceanport's notice of acquisition of its real property on August 23, 1973. (A260) The bar was managed by plaintiff Frank Pietroniro and disbursed its profits to him each year. (A987-988, A727, A990-991, A1844).

Defendants intentionally failed to fulfill their promise to assist in relocation and wrongfully failed to provide appropriate relocation assistance. In addition, they engaged in a series of acts which maliciously injured the plaintiffs, causing them financial and physical injury.

STANDARD OR SCOPE OF REVIEW

The standard or scope of review is essentially reflected in the "argument" section of this petition, which sets forth the overlooked or misapprehended facts. In essence, the plaintiff argues that the three-judge panel misunderstood certain facts and that there is sufficient evidence to support the jury verdict.

Argument--Summary

This case should be reheard because confusion at oral argument, possibly because of Plaintiff's counsel's nervousness in her first appearance in a Federal Circuit Court, as well as the fact that she was representing her parents' corporation, gave the erroneous belief that the plaintiff had conceded the deciding question of fact.

The issue is whether there was comparable property within the Borough of Oceanport to which the Plaintiff should have been referred. The panel expressly stated, at page 15, that the plaintiff conceded that there was no such comparable property and, therefore, concluded that as a matter of law there was no causal link between the defendants' wrongdoing and plaintiff's injury. In fact, however, the plaintiff argues that <u>there was</u> such comparable property but only <u>during 1973-1974</u> and that the defendants wrongfully

failed to refer it to the Plaintiff. The comparable property was the "Kincaid" Property, which was discussed by at least nine different trial witnesses. Defendants admitted the property was both comparable and available. Testimony and exhibits regarding this property permeate the entire trial record and transcript, appearing on over forty (40) pages.

At oral argument, plaintiff focused on the specific argument that, after the end of 1974, there was no available comparable property and that the defendants were statutorily required to provide such a site. The panel disagreed. However, because of the limited focus of counsel's statements, the panel never addressed the defendants' wrongful failure to refer the Kincaid Property in 1973-1974, which was well documented at trial. Plaintiff's counsel's inability to articulate her position more clearly

at argument should not be permitted to reverse a unanimous jury verdict based on first-hand observation of the witnesses and relevant evidence.

Another reason why this should be reheard is that there was a second causal link. Explicit evidence in the record demonstrates that the defendants lied about their intentions at the statutorily required public hearings on the relocation program and in developing their master plan. Were it not for this fraud, it may well have been impossible for the defendants to have obtained technical approval from the US Department of Housing and Urban Development or political approval from the townspeople of Oceanport. This is not a case where defendants changed their minds after the making of good faith promises.

Because a rehearing is needed only because of confusion at oral argument,

no new authorities are cited. I have instead attempted only to clarify the operative facts.

Point One
Defendants Wrongfully Failed To Refer Plaintiff to the Kincaid Property

In its decision, the three-judge panel noted that there was evidence that the defendants acted in bad faith in the relocation program, that they lied to the public, saying that certain businesses would be allowed to remain in the redeveloped zone, that they harrassed the plaintiff during eviction proceedings, that they suggested relocation sites which were obviously incompatible with the Plaintiffs' needs, that defendant Sommers purchased a liquor license for himself at bargain prices because of the existence of inactive licenses, such as Piet's, and that other defendants tried to convince Piet to sell its inactive license at a deflated price.

Nonetheless, because of counsel's confusion, the panel believed that the Plaintiffs had conceded that there was no feasible alternative location and ruled that there was no proximate cause as a matter of law.

Yet the trial record demonstrates that the plaintiff did not concede that there was never a feasible alternative location. One site, the so-called "Kincaid" Property was an available, compatible location until November 29, 1974. Moreover, the defendants knew about this site but wrongfully failed to mention it to the plaintiff.

The defendants admitted that the Kincaid Property was zoned for commercial use. See testimony of Sommers at A2021, A2022. See also Boynton at A1645,A1648; Bataas at A687. There is absolutely no dispute as to this point.

Moreover, defendants' real estate

witness, Allan M. Heaslip, testified the Kincaid Property was "comparable" to the property from which the Plaintiff was evicted. (A2625) He stated that the Kincaid Property was especially valuable to Plaintiffs:

> "Remarkable aspect of it is I would presume that the name, that Piet Corp would wish to maximize the name under which it operated for 15 odd years; in other words, the Colonial Jockey Room. Relocating to either one of those locations (referring in part to the Kincaid Property) would put it (Piet) closer to the track and it could have maximized what it already had going for it it; in other words, 15 years of reputation with a name associated with racing.."(A2628)

Furthermore, the defendants admitted that prior to its November 29, 1974 sale to the Monmouth Park Jockey Club, ("Monmouth Park") the Kincaid Property was available and that they knew it. See testimony of Barrett, Leone and Sylvain at A2171, A2172, A2214,A2438.

Yet the plaintiff, Frank Pietroniro testified clearly on several occasions,

that he did not know that the Kincaid Property had ever been available until it was sold, and therefore unavailable. (A1122, A864) Asked why he did not offer to buy the Kincaid Property before Monmouth Park purchased it, he answered that the reason was that he did not know it was available. (A1122) Furthermore, he repeatedly denied that defendants had ever referred the property to him before its sale to Monmouth Park. For example, at A1119, he stated:

> A."Mr. Leone (a defendant) with the Kincaid Property, never, never mentioned that and you can check your coorespondence, never mentioned the Kincaid Property as a site for me to relocate..He did, however, after it was sold.." (Emphasis Added)

Although the defendants called Leone as a witness, he admitted on cross examination that he did not recall the true chronology of events. (A2208, A2209) The defendants then offered in evidence a letter from Leone to Pietroniro dated March 25, 1975 in which Leone asserted that

he had previously mentioned the Kincaid Property. That letter, coming three months after the sale of the property, was purely self-serving. Pietroniro testified that it was a lie. (A1220) In any event, the letter itself admitted that the Kincaid Property was not "thoroughly discussed" with the plaintiff. Moreover, Leone admitted that he did not provide the plaintiff with the information that he was required to provide under the law, such as costs, square footage and comparability. (A2202, A2203, A2204) This information was required in coordination with the 1973-1974 real property acquisition of Piet, because it is necessary in order for a relocating business to effectively consider a new site. (A423, A406, A2903, A2906, A2908, A2909, A2910, A2911). The Leone testimony is, in essence, really only an additional admission that the Kincaid Property was comparable.

The other suggestion at trial, that defendant Sylvain mentioned the Kincaid Property to Pietroniro prior to its sale is controverted not only by Pietroniro's testimony, but also by the fact that Sylvain himself never says he told Piet anything about the property. In fact, on two occasions, Sylvain lists the properties he mentioned to Pietroniro and conspicuously fails to list the Kincaid Property (A2262-A2264, A2348). Yet Sylvain admits that he knew about the Kincaid Property before its November 29, 1974 sale, and, in fact, had talked to William R. Bataas about it. Nor does the Kincaid Property come up in any of the many letters from Leone or Sylvain to Pietroniro, entered in the record as Exhibits prior to the time the Property was sold.

As further evidence of the defendants' failure to provide information

about the Kincaid Property, the Plaintiff produced the devastating and credible testimony of Bataas, who came all the way from Ohio to tell his story. Bataas, like the Plaintiff, had an active liquor license prior to the redevelopment. Unlike the Plaintiff, however, Bataas knew about the Kincaid Property. Because the LPA never referred him to the property, Bataas spent about a year and a half obtaining the appropriate information. He then arranged a meeting with the defendants Baxter and Sommers, as well as another member of the town council, to find out if the town would object to his relocating to that property. He testified that almost immediately after the meeting, Monmouth Park bought the property:

> A. "They (the mayor and town councilmen) said it didn't seem bad to them. The next thing I know it's (the property's) gone."
> Q. "Somebody else bought it?"
> A. "It's gone.."
> Q."...."
> A. "..and somebody in that office

> that I was sitting in, is what I was trying to get to before, told the race track I was going to buy it. One of the Township Fathers who are very dear and near to that race track and the race track paid.. more than I offered.." (A713, A714, A686, A687)

Monmouth Park, it should be noted, was at the time indebted to the defendants because the relocation program permitted the construction of a roadway leading to and benefitting its racetrack. The inference of collusion between the defendants and Monmouth Park could surely have been reasonably drawn by the jury.

In light of the defendants' many inconsistencies, contradictions and lapses of memory--and in light of the demeanor evidence--the jury could surely have reasonably found that the defendants, although they knew about the availability of the Kincade Property before its sale to Monmouth Park, never told the plaintiff about it. Had the Plaintiff been told, it could have purchased the prop-

erty and relocated.

Point Two
Defendants' Purposeful Misrepresentations Caused Plaintiffs' Injury

The trial record is replete with evidence that the defendants lied throughout the preliminary stages of the relocation program.

Businesses were told that they could relocate. They were specifically told that they could move into the commercial zone indicated on the "master plan". The defendants encouraged businesses to believe that Monmouth Park which owned almost all of that area, was going to build a shopping center into which they could relocate and that other business relocation would be possible. (A2071, A1482)

But defendant Sommers admitted on cross-examination that he knew as early as the 1960s, or at least by 1972, that Monmouth Park was not going to build a shopping center on its property. (A2035,

A2036, A2082,A2083)

At a 1972 public hearing, in response to questioning by many businessmen, a HUD representative made the following pledge:

> "Before any business is taken.. the plan has to show that there is a place for that business to go, otherwise we cannot approve the plan.. The relocation plan has to demonstrate the relocation resources for both businesses and residences will be available at such and such date.." (A2080)

The defendants present at that meeting, by their conduct, adopted this representation. In doing so, they committed a fraud on HUD and the Plaintiffs. They knew that, if Monmouth Park did not construct a shopping center, there would be no place for the displaced businesses to go. They wrongfully led HUD and the Plaintiffs to believe that the shopping center would be built, although they knew that Monmouth Park had no intention to construct it.

The defendants also promised that businesses would not be "hurt" (A1525),

that the master plan was being revised to provide more commercial sites,(A1481) that substantial assistance would be given to businesses (A1555), that rezoning would be undertaken to facilitate relocation (A1538-A1540), implying that 49 per cent of the property would be zoned for commercial use (A2080), and that certain property would be made available to businesses which had been forced to relocate (A1490-A1492).

The defendants failed to fulfill any of these promises. As one witness responded when asked how defendants had tried to help him, "Only thing they tried to do was help me out of town. None of the LPA members tried to help me at all." (A1520)

Defendants, through their planner, specifically represented that the master plan contained a written provision:

> "to the effect that existing businessmen in an area in and around the intersection of Oceanport Ave. (which would have included the plaintiffs) would be allowed to remain as long as they serve the existing

> neighborhood. Particularly, I suppose this would mean Fort Monmouth, such as the bars (which would have included plaintiffs) and the gas stations and so forth." (A1538-A1540)

But none of those bars were permitted to remain. Evidence in the record as to defendants' subsequent actions makes it abundantly clear that these representations were fraudulently made to secure the approval of HUD and Oceanport townspeople. Without these approvals, the federally-funded program could not have been instituted and plaintiff would not have been injured.

This was not a case where the defendants changed their minds after the making of good faith promises.

Conclusion

After six weeks of trial, a unanimous jury rendered its verdict against each of the defendants. Because of counsel's confusion at oral argument, this panel mistakenly believed that plaintiff had conceded the decisive

fact issue. In reality, it was the defendants who had admitted that the Kincaid Property, prior to 1975, had been an available, comparable relocation site.

Second, defendants made fraudulent misrepresentations which were essential in enabling them to implement the relocation program which injured the plaintiffs.

For these reasons, this panel should reinstate the jury verdict in this case.

Respectfully Submitted,

Dated: July 1, 1985.

/s/ Cynthia P. Liebling
Cynthia P. Liebling

Certification of Counsel

This appeal involves a question of exceptional importance, to-wit:

Defendants' acts have wrongfully deprived plaintiffs of their liquor license, thereby violating their fundamental and personal rights under the Fifth and Fourteenth Amendments to the US Constitution to pursue the calling of their choice.

Dated: July 1, 1985.

/s/ Cynthia P. Liebling
Cynthia P. Liebling

Certification of Bar Membership

I hereby certify that, pursuant to Local Rule 9(1), I am duly admitted to practice before the Third Circuit Court of Appeals.

Dated: July 1, 1985.

/s/ Cynthia P. Liebling
Cynthia P. Liebling

Certification of Service

I hereby certify that on this 1st day of July, 1985, I did cause to be delivered to the Court by courier an original and eleven copies of the Plaintiff's Petition for a Rehearing.

I further certify that on this 1st day of July, 1985, I did mail, via Express Mail three copies of Plaintiff's petition to counsel for the Defendants Connell, Foley & Geiser, Att: John F. neary Esq., Theodore F. Geiser Esq., and two copies to counsel for the Plaintiff, Joseph F. Mattice Esq.

Dated: July 1, 1985.

/s/ Cynthia P. Liebling
Cynthia P. Liebling

Sur Petition for Rehearing

ORDER

Present: Aldisert, Chief Judge; Seitz, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Circuit Judges, and Giles, District Judge.

The Petition for Rehearing filed by Frank Pietroniro, appellee in the above entitled case, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

Dated: July 18, 1985.

/s/ A. Leon Higginbotham
Circuit Judge

QUESTIONS TO BE ANSWERED BY THE JURY

RE: FRANK PIETRONIRO, et. al. v. Boro of Oceanport, et. als., No. 79-1836

1. Do you find from a preponderance of the believable evidence that the plaintiff Piet Corp. received all the relocation assistance to which it was entitled under applicable law?

Yes___ No x

(If your answer to this question is "Yes", please cease your deliberations and return your verdict to the Court. If your answer is "No", please proceed to answer the following questions.)

2. Do you find from a preponderance of the believable evidence that the actions or inactions of one or more of the defendants was a proximate cause of Piet Corp's failure to receive all the relocation assistance to which it was entitled? If so, indicate which of the defendants:

	Yes	No
Boro of Oceanport	X	
Louis Sylvain	X	
Nicholas Leone	X	
George Barrett	X	
Clement Sommers	X	
Elwood Baxter	X	

3. As to any individual defendant to which your answer to Question #2 is "Yes": Do you find by a preponderance of the believable evidence that that defendant acted in bad faith, that is, that he knew or should have known that his actions or inaction denied Piet Corp. relocation assistance to which that plaintiff was entitled?

	Yes	No
Louis Sylvain	X	
Nicholas Leone	X	
George Barrett	X	
Elwood Baxter	X	
Clement Sommers	X	

4. If your answer to Question #2 is "Yes" as to the defendant Boro of Ocean-

port, what damages, if any, has the plaintiff Piet Corp. established were proximately caused by that defendant's failure to render Piet Corp. all the relocation assistance to which it was entitled?

$ 94,950.00

5. As to any individual defendant to which your answers to both Questions #2 and #3 is "yes", what damages, if any, has plaintiff Piet Corp. established were proximately caused by that defendant's failure in bad faith to render Piet Corp. all the relocation assistance to which it was entitled?

Louis Sylvain	$ 5,000
Nicholas Leone	$ 5,000
George Barrett	$ 10,000
Clement Sommers	$ 40,000
Elwood Baxter	$ 30,000

6. What is the total sum of money which

you award to plaintiff Piet Corp. because it failed to receive all the relocation assistance to which it was entitled?

$ 184,950.00

7. What damages for physical and/or emotional injuries, if any, has Frank Pietroniro established were proximately caused by the failure of the defendant Boro of Oceanport to render, or the failure in bad faith of any individual defendant to render relocation assistance to which Piet Corp. was entitled?

Boro of Oceanport	$ 3,000
Louis Sylvain	$ 2,000
Nicholas Leone	$ 2,000
George Barrett	$ 2,000
Clement Sommers	$ 2,000
Elwood Baxter	$ 2,000

8. What is the total sum of money which you award to Frank Pietroniro for his physical and/or emotional injuries?

$13,000